IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.145 OF 2007

Shri.A.Majid Fakir Kazi
Aged 35 years, residing at
5/50, Moin Manzil, 1st floor,
Veer Savarkar Road, Mahim (W),
Mumbai 400 016. .. Petitioner

V/s

1. Shri.A.N.Roy,
   Commissioner of Police for Gr.Mumbai

2. State of Maharashtra

3. The Superintendent of Jail,
   Thane Central Prison, Thane.

4. The Superintendent of Jail
   Nashik Central Prison, Nashik .. Respondents

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Mr.M.Kocharekar for the Petitioner.

Mr.S.R.Borulkar, Public Prosecutor with Mr.A.R.Patil (APP) for the Respondents.

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CORAM : DR.S.RADHAKRISHNAN, & SMT.R.S.DALVI, JJ.

DATE : 10th September, 2007.

JUDGMENT:- (Per Dr.S.Radhakrishnan, J.)

1. By this petition, the Petitioner is challenging the detention of his brother Azim Fakir Kazi who has been detained pursuant to the Detention Order dated 26.10.2006 passed by the Commissioner of Police, Brihanmumbai, under the provisions of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 (hereinafter referred to as the "said Act"), read

with Article 22(5) of the Constitution of India.

2. It appears that the detenu Azim was served with the copy of Detention Order as well as the grounds of detention alongwith the same on 1st November, 2006 in jail since the detenu was already in custody. The brief facts are that the detenu was arrested on 14th April, 2006 with regard to an incident of murder which had taken place in the Basher Manzil Compound near Darga Street. As stated in the detention order it is alleged that the complainant had noticed the detenu alongwith his associates Raju @ Mohamed Asik Mohamed Samir Siddiqui and other unknown associate in front of Basher Manzil, and the complainant noticed that the detenu took out a country made revolver and fired one round at deceased Akbar Mohamed Husain Shaikh @ Akbar Dadhi, as a result of which the deceased Akbar ran away and entered the Basher Manzil Compound and collapsed on the ground. It is stated that the detenu and his associates also followed deceased Akbar inside the compound of the said building. Thereafter the complainant heard noise of three gunshots from the Basher Manzil Compound, and soon thereafter the complainant who is the policeman also noticed the detenu and his associates running out of Basher Manzil Compound towards the Darga Street. At that time complainant found people running helter-skelter in a state of panic, the shopkeepers pulling dowon their shutters and the residents in that

area closing their doors and windows. It is stated that the complainant (who being the policeman) chased the detenu and when the detenu was trying to flee on a motorcycle near Makhdumiya Hotel, the Complainant caught the detenu on waist of his pant and with the other hand he caught hold of the plastic bag to thwart any attempt by detenu to take the country made revolver from the said bag. It is stated that at that time the Mahim-II Police Mobile Van also reached the spot. As stated in the detention order, it appears that the detenu was also hit with a bullet misfired by one of his associates on his stomach, and therefore, the detenu was immediately taken to Bhabha Hospital where he was admitted and treated. It appears that the complainant also produced plastic bag found in detenu's possession in which the detenu had kept the country made revolver after opening fire at the deceased. The police had seized the said motorcycle and the contents of the said plastic bag viz. a chopper of total length of 33 centimeter, a country made revolver with empty cartridge of 12 bore, a telephone diary under panchanama. On the very same day a complaint was lodged by the complainant against the detenu and his associate Raju @ Mohamed Asik Samir Siddiqui and other unknown associate at Mahim Police Station for the offence under Section 302, 34 of the Indian Penal Code read with Section 3, 4, 25 and 27 of the Arms Act. Thereafter, the Police Authorities conducted the regular investigation and in the meanwhile

on 30th June, 2006 the detenu who was admitted and treated for his stomach injury came to be discharged from the hospital, and from there he was immediately taken to the police custody on the very same day. It appears that the detenue was formally arrested on 30th June, 2006 in the aforesaid offence of murder. The Chargesheet has been filed on 26th September, 2006 and it is pointed out that one of the co-accused of the detenu has been released on bail on 9th September, 2006.

3. It is also stated in the grounds of detention that the detenu is a very dangerous person and is creating panic in the entire locality in the Mahim (West), Mumbai. In that behalf the incident narrated by witness 'A' has been recorded on 5.9.2006, wherein the said witness who was doing the business on Veer Savarkar Road, Mahim has stated that he was knowing the detenu as a notorious criminal operating in the said locality at the point of weapons like revolver, sword, chopper and knife, and alongwith his associates the detenu used to extort money as hafta from shopkeepers, hawkers and businessmen and used to create terror in the adjoining areas, and that nobody was ready to complain against the detenu due to fear. The said witness 'A' has further narrated the factual incident which happened in the first week of April, 2006 at about 19.30 hours when the said witness was going to Dadar to purchase articles required for his business. The witness 'A' has stated

that on that day the detenu and his three unknown associates had accosted him in front of showroom of Altaf Furniture on Veer Savarkar Road, Mahim. At that time the said witness got scared and made effort to run away, however the detenu's two associates caught hold of him and the detenu started assaulting the witness. When the witness shouted loudly for help the passers by and some taxi drivers rushed there when the detenu took out a revolver and the detenu's associates took out sword, chopper etc and pointed out those weapons at people and threatened them using the abusive language saying if anybody dares to come ahead he will be cut to pieces. It is stated that, seeing them armed with lethal weapons and hearing their threatening utterances, people started running helter-skelter, hawkers left their belongings on the pavement and ran away, shopkeepers pulled down their shutters out of fear. It is stated by the said witness that the detenu thereafter rested the revolver at his stomach and threatened him by saying "he is the Badshah of Mahim area and that the witness should give him Rs.10,000/- immediately, otherwise he would be killed". Thereafter one of the associates of the detenu forcibly removed Rs.6000/- from the pant pocket of the said witness and then took out a button knife from his own pocket and threatened the witness saying "they will come to collect the balance money within 2-4 days and the witness should keep the money ready, and that if the witness were to go to police he would be killed". The

witness has further stated that due to fear of reprisal, he did not complain to police.

4. The grounds of detention also reveal the notorious criminal activities of the detenu as recorded in the statement of the witness ‘B’ which was recorded on 7.9.2006. The said witness ‘B’ has narrated one factual incident happened in the fourth week of March, 2006 at about 19.00 hours, when the said witness was attending to his customers at his business place at Kapad Bazar. At that time he found people were running helter-skelter and when the said witness & his customers looked at the said place, they found that the detenu and his two associates were rushing at the witness. Detenue was armed with a chopper and one of his associates was holding a revolver and the other was holding a sword, and seeing all of them armed with lethal weapons, the people got scared and ran away. The customers of the witness were also scared and ran away, and when the witness was pulling down his shutter, one of the associate of the detenu rushed at him and rested revolver at the chest of the witness and threatened him saying "do not hide yourself, otherwise I will kill you". Thereafter the detenu kicked the witness as a result of which the witness fell down. Detenu then held chopper at the neck of the witness and said "you are doing business in my area and you are not coming to meet me. If you want to be alive, you should give

Rs.50,000/-". When the witness expressed his inability to give the large amount, one of the detenu's associate who was holding sword hit the articles with the sword and caused damages, and the other associate held the revolver at the head of the witness and threatened the witness by saying - "If you are not giving Rs.50,000/- you will not be kept alive to do the business, and if you will go to police all your kith and kins will be killed". Due to fear the witness tookout Rs.7000/- and handed over to the detenu, whereupon the detenu pointed out the chopper and further threatened by saying - "I want full amount of Rs.50,000/-, keep it ready by four days when they would come to collect it". The witness has stated that he got terribly frightened and thereafter closed his business, and only when he came to know that the detenu has been arrested by the Police, the said witness has restarted his business.

5. Based on the above incident of murder as well as statements of both the Witnesses, the Detaining Authority after perusal of the entire record has passed the Detention Order under the said Act so as to prevent the detenu from in any manner acting prejudicial to the public order.

6. Mr.Kocharekar, the learned Counsel for the Petitioner has contended that though in the petition various grounds are raised challenging the said

detention, he has restricted his challenge only by way of ground No.VIII, which read as under:-

> "The Petitioner says and submits that the grounds of detention in para 7, the Detaining Authority satisfied that the Detenu is acting in a manner prejudicial to the maintenance of order and also shown the awareness that the Detenu is in judicial custody and he has not granted bail by the Hon'ble Court in C.R.No.112/2006 registered at Mahim Police Station. However, the Detaining Authority arrived at subjective satisfaction that the detention order against the Detenu is necessity. It is submitted that the Detaning Authority failed to consider that the Detenu has not filed any bail application before the Hon'ble Court. The entire evidence disclosed that the Detenu was a participant in the alleged crime. It is submitted that the chargesheet has been filed before the Hon'ble Sessions Court and the said case has been posted to the Fast Tract Court. In these circumstances, there is no compelling reason to isue the detention order as the Detenu is in custody and there are no chances of getting bail in near future. Thus the detention order is bad in law as also reflects non application of mind on the part of the Detaining Authority."

7. The main contention of the learned Counsel for the detenu is that as the detenue was already in custody with regard to the incident of murder which took place on 14th April, 2006 and he was taken to the hospital for treating him for stomach injury, and after his discharge from 30th June, 2006 he has been continuously in custody with regard to the said offence of murder and further that the detenu has not filed any application for bail before the Sessions Court, the Detaining Authority has failed to consider the aforesaid relevant facts. According to Mr.Kocharekar, the issuance of Detention Order could not be justified as there are no compelling

circumstances necessitating such a Detention Order as there are no chances of the detenu getting bail, and as such, the aforesaid Detention Order should be quashed and set aside on the ground of non application of mind. Therefore it is the contention of Mr.Kocharekar, the learned Counsel for the detenu that the detenu has already been in custody with regard to the serious offence of murder and over and above the detenu has not preferred any application for bail so far and that there is no likelihood of detenu being released on bail, and in such circumstances, the Detention Order was totally unjustified since the Detaining Authority has not properly applied its mind while passing the Detention Order.

8. In support of his contentions, Mr.Kocharekar, the learned Counsel for the detenu has referred to and relied upon the following judgments. Firstly, Mr.Kocharekar referred to and relied upon the judgment of the Hon'ble Supreme Court in the case of **Dharmendra Suganchand Chelawat and Another V/s.Union of India & Ors.- AIR 1990 Supreme Court 1196,** wherein, in paragraph No.21, the Supreme Court while dealing with this issue has observed as under:-

> "We have given our careful consideration to the aforesaid submission of the learned Attorney General. We are, however, unable to agree with the same. In the grounds of detention the detaining authority has only mentioned the fact that the

> appellants has been remanded to judicial custody till October 13, 1988. The grounds of detention do not show that the detaining authority apprehended that the further remand would not be granted by the Magistrate on October 13, 1988, and the appellants would be released from custody on October 13, 1988. Nor is there any material in the grounds of detention which may lend support to such an apprehension. On the other hand we find that the bail applications moved by the appellants had been rejected by the Sessions Judge a few days prior to the passing of the order of detention on October 11, 1988. The grounds of detention disclose that the appellants were engaged in activities which are offences punishable with imprisonment under the provisions of the narcotic Drugs and Psychotropic substances Act, 1985. It cannot, therefore, be said that there was a reasonable prospect of the appellants not being further remanded to custody on October 13, 1988 and their being released from custody at the time when the order for preventive detention of that appellant was passed on October 11, 1988. In the circumstances, we are of the view that the order of detention of the appellants cannot be sustained and must be set aside and the appellants should be released forthwith. These are the reasons on the basis of which we passed the order for the release of the appellants on January 11, 1990. It is, however, clarified that in case the appellants are released from custody in the aforesaid criminal proceedings the question of their preventive detention under the Act on the above material may, be reconsidered by the appropriate authority in accordance with law and this decision shall not be construed as an impediment for that purpose. Order accordingly.

9. Mr.Kocharekar, the learned Counsel for the detenu has contended that by applying the ratio laid down in the aforesaid judgment, even in the present case at the time when Detention Order was passed, there was no likelihood of detenu being released and the said fact was not properly considered by the Detaining Authority. Mr.Kocharekar referred to and relied upon the Division Bench judgment of our Court in the case of **Amit Rakesh Janbandhu V/s.State of Maharashtra & Anr.- 2002 ALL MR**

(Cri) 1983, wherein the Division Bench, after considering the various judgments of the Supreme Court and our Court has observed as under in Paragraph No.16:-

> "We are unable to accept the contention raised by the learned A.P.P. appearing on behalf of the State. From the ratio of the various judgments cited by both the parties it is very clear that though the Detaining Authority had every right to validly issue an order of detention in respect of the detenu who is already in custody, it was necessary that there should be cogent material on record to suggest that the detenu was likely to be released on bail in the near future. In the present case, it is an admitted position that the petitioner had not made any application for bail. There was, thus, no question of petitioner being released on bail. Though the last chargesheet was filed on 28.5.2001 even thereafter the petitioner had not filed any application for bail. There was, thus, no cogent material on record to suggest that the petitioner was likely to be released on bail. In our view, therefore, in the absence of there being any cogent material and special material which was subsisting at the time when the Detaining Authority passed the order of detention indicating that the detenu is likely to be released on bail, the order of detention can not be sustained and has to be set aside."

10. Mr.Kocharekar, the learned Counsel for the detenu has pointed out that even in the present case there was no cogent material on record to suggest that the detenu was likely to be released on bail, and therefore, the Detention Order is liable to be quashed and set aside. In support of his submissions, he referred to and relied upon the judgment of our Court in the case of **Prakash Balkrishna Pujari V/s.The Commissioner of Police, Gr.Mumbai & Ors. - 2006 ALL MR (Cri) 2115,** wherein the Division Bench, after considering the various judgments

of our Court as well as the judgment of the Hon'ble Supreme Court in the case of **Venkatachaariar Chaturvedi V/s.State through Secretary & Anr. - 2006 (1) Supreme Court Cases (Cri) 593,** has quoted the observations of the Hon'ble Supreme Court in paragraph No.14 of the aforesaid judgment in the case of **Venkatachaariar Chaturvedi,** which read as under:-

> "We are satisfied that for the same reason the order of detention cannot be upheld in this case. The bail applications moved by the appellant had been rejected by the Courts and there was no material whatsoever to apprehend that he was likely to move a bail application or that there was imminent possibility of the prayer for bail being granted. The "imminent possibility" of the appellant coming out on bail is merely the ipse dixit of the detaining authority unsupported by any material whatsoever. There was no cogent material before the detaining authority on the basis of which the detaining authority could be satisfied that the detenu was likely to be released on bail. The inference has to be drawn from the available material on record. In the absence of such material on record the mere ipse dixit of the detaining authority is not sufficient to sustain the order of detention. There was, therefore, no sufficient compliance with the requirements as laid down by this Court. These are the reasons for which while allowing the appeal we directed the release of the appellant by order dated 13.12.2005."

11. Based on the above judgment, the Court finally held that there was no cogent material sufficient for grant of bail, and as such, the Detention Order was set aside. Mr.Kocharekar, the learned Counsel for the detenu has referred to and relied upon another judgment of the Supreme Court in the case of **T.V.Saravan @ S.A.R.Prasana Venkatachaariar Chaturvedi V/s. State through Secretary**

& Anr.- 2006 ALL MR (Cri) 1204 (S.C.), wherein, in paragraph No.7 the Supreme Court has referred to the earlier judgient in the case of **Binod Singh V/s.District Magistrate, Dhanbad, Bihar and Others - (1986) 4 SCC 416.** In paragraph No.7 of the judgment in **Binod Singh's case**, the Supreme Court has observed as under:-

> "7. ..... If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised....."

12 . The learned Public Prosecutor Mr.S.R.Borulkar has very strongly sought to defend the action of the Detaining Authority and he fairly conceded that in the grounds furnished to the detenu alongwith the Detention Order, the only relevant portion dealing with the above is paragraph No.7, which reads as under:-

> "7. I have carefully gone through the material placed before me, and I am subjectively satisfied that, you are acting in a manner prejudicial to the maintenance of public order. I am aware that you are still in judicial custody as bail has not been granted to you in Mahim Police Station C.R.No.112/2006. However you may be granted bail under the normal law of the land in this case in due course. In view of your tendencies and inclination reflected in the offences committed by you as stated above, I am further satisfied that after released on bail you will be free person, being a criminal, you are likely to revert your criminal activities prejudicial to the maintenance of public order in future and that it is necessary to detain you under the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 to prevent you from acting in such a prejudicial manner in future."

13. Mr.Borulkar, the learned Public Prosecutor has conceded that in the said paragraph there is no indication or reference of any cogent material which influenced the Detaining Authority to pass the said Detention Order. The aforesaid paragraph No.7 in the grounds of detention, clearly indicates that the Detaining Authority was fully aware that the detenu was in judicial custody and that he has not been granted bail with regard to the offence of murder. However, it is observed in the said paragraph that the detenu may be granted bail under the normal law of the land in this case in due course. There is no other mentioning as to what is the basis of that. Mr.Borulkar, the learned Public Prosecutor has pointed out paragraph No.12 from the affidavit in reply of Mr.A.N.Roy, the then Commissioner of Police, and the relevant portion of paragraph No.12 reads as under:-

> "12. ..... I state that in the facts of the case although the detenu was holding country made revolver had actually fired at the deceased, which was proved to be fatal. However, considering the fact that the detenu also received injury in the said incident and also considering the fact that one of the associate of the detenu was released on bail, therefore, I was satisfied that the detenu would apply and may be get bail under normal law of land. I state that on the basis of cogent material and considering the manner in which the detenu was indulging in prejudicial activities, I was satisfied that the detenu would get bail under normal law of land and would indulge in similar activities prejudicial in future."

14. Mr.Borulkar, the learned Public Prosecutor has

sought to contend that the Detention Authority may not disclose in the grounds of detention alongwith the Detention Order, all the particulars. However, same has now been disclosed by way of an affidavit. In that behalf, Mr.Borulkar referred to and relied upon the judgment of the Hon'ble Supreme Court in the case of **Devi Lal Mahto V/s State of Bihar and Another - AIR 1982 SC 1548.** The observations of the Supreme Court in paragraph No.5 of the said judgment are relevant, which read as under:-

> It is further held that this awareness must appear either in the order or in the affidavit justifying the impugned detention order when challenged. Neither in the order nor in the affidavit we find even a whimper of this aspect being present to the mind of the detaining authority while making the detention order. Therefore, it clearly discloses non-application of mind and following the aforementioned decisions it must be held that the order of preventive detention having been mechanically made and suffering from the vice of non-application of mind is vitiated.

15. Mr.Borulkar, the learned Public Prosecutor has strongly contended that in the instant case, when the Detaining Authority was considering all the material before him, the Detaining Authority took into account two factors which were material and which weighed for passing the Detention Order, though the detenu was in custody. The aforesaid two factors were that the detenu had already suffered injury in the said incident and that one of the associates of the detenu was released on bail, and

therefore, the Detaining Authority felt that the detenu may also get bail under the normal law of land.

16. The learned Public Prosecutor has further submitted that as the co-accused of the detenu was already granted bail the Detaining Authority rightly applied its mind and passed the Detention Order. The learned Public Prosecutor produced before us the material which was furnished to the detenu and based on the said material the said Detention Order was passed. The relevant one was the order of bail dated 11.09.2006 granted to one of the co-accused Akbar Mehboob Sayyed @ Akbar. We have perused the said order dated 11.09.2006 wherein the Court has categorically observed that as far as the said co-accused was concerned, his name did not appear at all in the FIR and he was not identified by the witness in the identification parade and that there was no overt act alleged against the said accused pertaining to the incident of death. There was only some reference of certain telephonic conversation between the deceased and the co-accused. Under these circumstances, the Court found prima-facie that there was no involvement on the part of the said co-accused and accordingly granted bail to the said co-accused of the detenu.

17. In the instant case, Mr.Borulkar however could not dispute that the detenu was caught immediately after the said incident of murder by the complainant who himself was

the police constable. The complainant himself was the eye witness, who had witnessed the incident of murder, and even the lethal weapons such as revolver and chopper were also seized immediately when the detenu was caught while he was trying to flee on the motorcycle. In support of his submissions, Mr.Borulkar also referred to and relied upon the judgment of our Court in the case of **Sayyed Akbar Ali @ Jugnu Sayyed Hasim Ali V/s.A.N.Roy & Others dated 19th September, 2005 passed by the Division Bench in the Criminal Writ Petition No.1362 of 2005.** We find that the said judgment is not applicable in the present case as the facts of the said judgment are totally different.

18. After hearing the learned Counsel for the detenu as well as the learned Public Prosecutor we find that that the detenu was apprehended on 14th April, 2006 immediately after the incident of murder on the scene of offence itself, and the weapon which was used for commission of murder was also seized immediately alongwith the motorcycle on which the detenu was trying to flee. On the very same day, it appears that as the detenu had suffered bullet injury caused by one of his accomplice he was rushed to the Bhabha Hospital, and when he was discharged from the said hospital on 30th June, 2006 he was immediately arrested on the same day, and thereafter the chargesheet appears to have been filed on 26th September, 2006.

19. It is true that the detenu is entitled to apply for bail, however, having regard to the facts and circumstances of the case, especially the involvement of the detenu in the aforesaid case of murder, there is no imminent likelihood of being released on bail. Even the injury of accused would be of no use as he was fully treated and discharged on 30th June, 2006 and thereafter he has been in jail custody. The Detaining Authority ought to have disclosed clear cogent material justifying the said Detention Order so as to prevent the detenu from acting in any manner prejudicial to the public order. The Detaining Authority also ought to show that there is an imminent likelihood of detenu being released on bail. The Detaining Authority has failed to show any "compelling reasons" for such a detention order. Applying the aforesaid ratio as discussed by the Supreme Court as well as our Court in the various judgments mentioned above, we find that in the instant case, the Detaining Authority though was aware that the detenu was in the custody in the aforesaid case of murder and though the Detainng Authority was aware of the bail order dated 11.09.2006 whereby one of the co-accused of the detenu was granted bail who had no role to play, which is also referred to in the affidavit in reply and is part of the material furnished to the detenu alongwith the grounds of detention, we do not find any cogent material showing imminent likelihood of detenue being released on bail, enabling the Detaining Authority to pass the said order of detention. Under the

aforesaid facts and circumstances, applying the principle laid down in the aforesaid judgments of the Supreme Court as well as the judgments of our Court, we are not satisfied that in the present case that the Detaining Authority could have passed the detention order on the ground that there was an imminent likelihood of the detenu being granted bail. We also find that the Detaining Authority has failed to disclose the compelling reasons justifying such detention despite the fact that the detenu has already been in the custody. Hence, the impugned detention order dated 26th October 2006 stands quashed and set aside and the detenu shall be released forthwith, if he is not required in any other case.

20. However, we make it clear that the detenu is already in custody with regard to the offence punishable under Section 302 of the Indian Penal Code and that he has not been granted bail.

21. Writ Petition stands disposed of accordingly.

(SMT.R.S.DALVI, J.) **(DR.S.RADHAKRISHNAN,J.)**